IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 126.

C. A. STARKEY, PLAINTIFF IN ERROR,

vs.

NELSON BURNHAM, DEFENDANT IN ERROR.

MOTION FOR A CONTINUANCE.

Now comes the plaintiff in the above-entitled action, by B. W. Perkins, his attorney, and here moves the Court that all the cases hereinafter mentioned, involving the same issues of law, be consolidated, and that the above-entitled action be continued to the next term thereof for the reasons following to wit:

1. That there is now pending in the circuit court of the United States for the district of Kansas, about to be appealed to this Court, an action instituted under the direction of the Attorney General of the United States, in the name and behalf of the General Government, for the purpose of securing the cancellation of the patent issued to the M., K. &

T. Railway Company, which includes the land in controversy in this case, upon which patent the defendant relies as the muniment of his title, and to properly consider and dispose of the rights of the parties and in justice to this plaintiff it is necessary that said case be consolidated with and considered at the same time this case is disposed of to save time of the Court, protect the rights of the plaintiff, to save expense of printing and litigation.

2. For the reason that the plaintiff is prosecuting his appeal in this case in good faith, but, owing to his indigent circumstances he has been unable during the time that said case has been pending in this Court without distressing him and encumbring his property to pay the expense of printing the record therein, as provided in rule 10; but he believes if the Court will grant him the extension prayed for that before the next term thereof he will be enabled to comply with the rules of the Court and thereby have his case considered on its merits and his interest in the premises protected.

3. That if said case is dismissed at the present term on account of the record not being printed, as provided in said rule 10, great hardship will result to the plaintiff on account of reasons over which he has no control, but which he believes he can protect himself against if the continuance herein prayed for is granted.

4. That during the time said case has been pending in said Court no appearance has been made therein by the defendant until quite recently, when the plaintiff appealed to defendant's counsel for a time, which was refused, and the

plaintiff believes that the defendant has now entered an appearance in the case for the purpose of oppressing and distressing said plaintiff by securing a dismissal thereof for want of compliance with said rule and taking advantage of him in his financial embarrassment to prevent the Court from passing upon the merits of the case and to deprive the plaintiff of property to which he believes he is rightfully entitled.

5. That there are now pending in this Court four cases, to wit, No. 451, N. L. Ard *vs.* Alexander Brandon; No. 452, N. L. Ard *vs.* C. H. Pratt; No. 453, Mary E. Wood *vs.* J. M. Beach; No. 454, William Maddox *vs.* Nelson B. Burnham, involving the same questions of law which are at issue in this case, which cases will not be reached until the next term of the Court, and the plaintiff therefore asks that all these cases, involving the same questions, may be consolidated and considered at the same time, that the Court may have the benefit of a full argument on all the propositions involved, which are of serious moment to the settlers on said lands and involving difficult and intricate questions of law.

6. That the plaintiff has recently secured the services of counsel to present his case to the Court, who have not yet had an opportunity to examine the case with that fullness of detail which is necessary to present a question of the magnitude involving the construction of a statute making a land grant which affects the rights of so many settlers as will be reached by a decision in this case.

7. That the plaintiff is informed and believes that his honor Justice Harlan held in the case now pending in said circuit court that the patent under which the defendant claims title from the M., K. and T. Railway Co. should be canceled, and in the interest of justice and equity the plaintiff asks the indulgence of the Court, that he may be given this chance to defend his claim to the land in controversy.

8. That the Hon. William Lawrence, of Bellefontaine, Ohio, is interested in the questions here involved, and believes that all the cases bearing upon that issue should be heard together, and so advises. As evidence thereof a letter this day received from him is herewith filed and asked to be considered. It is as follows:

BELLEFONTAINE, OHIO, *Nov.* 20, 1893.

Hon. BISHOP W. PERKINS, *Oswego, Kansas.*

DEAR SENATOR: Nov. 17 the clerk Sup. Court U. S., writes that case of C. O. Starkey *v.* Nelson Burnham, No. 126, and Starkey *v.* Englehart, No. 127, will probably be called the latter part of next week (now this week), and you are the attorney, and I presume you will be on hand to see to them or telegraph and have them delayed until you reach Washington. The clerk writes that as the record is not printed they will be dismissed under the 10th rule unless cause is shown to the contrary. You know that the Sup. C't, Justice Harlan delivering opinion, decided in case of U. S. *v.* M., K. & T. R'y Co. in favor of cancelling patents. The case then went back to circuit court, Topeka, and will again go up to Sup. Court. I think these 2 cases should *await* the coming of the case now at Topeka and *then* all be *consolidated* and heard together. I suppose you will so move the Court. The case of N. L. Ard must be in same condition. You have that case. The lands in Ard's case and in these 2 cases are included in the bill now in case at Topeka. It will require prompt attention.

In haste, truly, &c., WM. LAWRENCE.

(9.) That the defendant cannot possibly be prejudiced by the continuance herein prayed for except by preventing the case from being heard upon its merits, and the plaintiff asks this honorable Court in its discretion to give him a further opportunity to present the questions involved and protect his home by granting the relief prayed for.

If the Court in the administration of justice believes it should not grant this motion in whole, then the plaintiff prays that this case may go to the foot of the docket, that he may, if possible, by encumbering his property raise the money necessary to comply with the rule and have his case considered on its merits by the Court. But he craves the grace thereof as a matter of merciful justice to him that this case, in the light of the circumstances surrounding it and the pendency of other cases involving the same questions of law, may be continued to the next term of this honorable Court.

If required, the plaintiff will verify the matters of fact herein set out as the Court may direct.

B. W. PERKINS,
Attorney for Plaintiff.